## Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–1 OF 2006(W)
ZAKI AZMI CHIEF JUSTICE, ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
4 DECEMBER 2008

*Legal Profession — Professional discipline — Suspension from practice — Complaint of misuse of client's money — Whether monies in firm's client account could be utilised by appellant to settle outstanding fees from respondent — Whether appellant received monies as stakeholder*

*Legal Profession — Professional discipline — Suspension from practice — Errors on face of orders issued by disciplinary board — Whether errors nullified order of disciplinary board*

The appellant who had been practising in the name of Messrs V Selva & Associates ('the firm') was the solicitor acting for both the respondent/purchaser and the vendors in the sale and purchase of a single storey terrace house ('the property') registered in the names of the vendors. The vendors who were government servants acquired the property with the assistance of a government loan for which the property was charged to the government. For the sale to be effective it was necessary that the charge be redeemed so that the property would be free to be transferred to the respondent. The sale price of the property was RM80,000, of which the respondent had paid RM40,000 upon execution of the sale and purchase agreement ('the SPA') on 8 December 1997. The balance RM40,000 to be paid by the respondent was to be utilised by the vendors towards the redemption of the housing loan. As at 30 March 1998, the statement of account showed the redemption amount, which was computed by the month, to be RM41,896.52. Therefore, less the amount of RM40,000 to be paid by the respondent, there remained a shortfall of RM1,896.52 which the vendors had to pay. June was the last month for which the Housing Loans Division had certified a redemption sum and no redemption sum was provided for payment at any time after June 1998. On 7 January 1998, the respondent paid a further sum of RM21,223.83 but since this sum was not sufficient to fully redeem the charge, it was not paid to the government but was paid into and kept in a client account in respect of the respondent. With the payment of RM21,223.83, the respondent still had to pay RM18,776.17

to settle the outstanding amount of RM40,000 of the purchase price. The appellant claimed that despite repeated requests for payment of the deficiency the respondent failed to pay. Thereafter on 25 February 1999 the appellant wrote to discharge himself from acting for the respondent in this property matter and all other matters in which he and his firm had been acting for the respondent. In fact, the respondent and the vendors had also discharged the appellant from acting further for them and appointed new solicitors to act for them in the SPA. The appellant who claimed that the respondent was owing him a total of RM34,690 in outstanding fees and disbursements wrote to the respondent's new solicitors claiming a settlement of the outstanding fees. The appellant then received a payment of RM3,263 for the bills in respect of two files, one of which was the SPA matter. The appellant sought to utilise the amount of RM21,223.83 in the hands of the appellant towards the settlement of the outstanding fees and disbursements of RM26,038, due to him from the respondent. In this regard the appellant wrote to the Bar Council seeking advice as to whether he would be in breach of the Legal Profession Act 1976 ('the Act') if he applied the sum of RM21,238.83, which was still in the client account, towards satisfying the outstanding fees. When this advice was not forthcoming, the appellant abandoned the idea of obtaining advice from the Bar Council and instead waited six months from the date of the delivery of the bill of costs to the respondent before drawing the sum of RM21,223.83 and applying it towards satisfaction of the costs due to him from the respondent. On 20 June 2000, the respondent wrote a complaint to the complaints secretariat that the appellant had wrongly misappropriated the RM21,223.83. A disciplinary committee ('DC') hearing was held on this complaint and the committee concluded that since the appellant held the RM21,223.83 deposited with the firm as 'stakeholder' it ought to have forwarded the same to the respondent's newly appointed solicitors and that the appellant did not have the right to set off the sum held by the firm on behalf of the respondent towards settlement of monies due to the firm from the respondent. The DC therefore found the appellant guilty of misconduct and recommended that he be suspended from practice for six months. The disciplinary board ordered the suspension by way of its order dated 27 June 2003. However, this order contained a mistake and to correct this error another subsequent amended order was issued, which corrected the error but contained another error. Each amended order by the board was then found to contain not once but repeatedly. The appellant appealed to the High Court against the decision of the board and submitted that since he was discharged as a solicitor by both the respondent and the vendors the SAP was terminated and that he had a lien over the money for settling his bills. The High Court held that the SAP had not been terminated and that the appellant held the money as stakeholder. In the present appeal against the decision of the High Court the appellant's stand was that he was not a stakeholder or trustee in respect of the RM21,223.83 because that sum was insufficient to redeem the charge and therefore the holding of it did not

qualify as stake holding. The issues before this court were whether the errors that appeared on the face of the orders by the board in any way prejudiced the appellant to nullify the order of the disciplinary board and whether in the circumstances of this case the amount of RM21,223.83 in the firm's client account could be utilised by the appellant to settle the outstanding fees from the respondent.

**Held**, dismissing the appeal with no order as to costs and setting aside the six month order of suspension and substituting it with a suspension of one month:

(1) (per **Zaki Azmi Chief Justice**) The errors committed by the disciplinary board that appeared on the face of the documents were very obvious clerical errors that could be corrected. As such these errors could not make the orders issued by the board void and unenforceable. If the errors were committed during the hearing of the DC or the disciplinary board and had caused prejudice to the appellant, then there was merit in the appellant's argument that the order was null and void. Therefore, although the board being a body for disciplining lawyers should not have repeatedly committed such negligent acts, the errors being clerical errors were not prejudicial to the appellant and could not nullify the order (see paras 21–23 & 25).

(2) (per **Zaki Azmi Chief Justice**) The appellant in this case was a stakeholder and as such, for as long as the SPA remained alive he was under a duty to hold the monies paid for the purpose of redemption or for the benefit of both parties to the SPA and not to utilise it for the payment of his bills. The appellant's submission that the SPA had been terminated could not hold because then there would be no purpose in the handing over of the SPA file to the new solicitors. The reason why the file was transferred to other solicitors was to continue with the deal. In addition, as the appellant in the present case was acting for both the vendors and the purchaser he owed a duty to both parties to ensure that the monies held by him were used for the very purpose for which he was holding it ie to redeem the property from the government. Since the SPA was still alive the money held in the client's account was still trust money (see paras 28, 31, 34 & 36).

(3) (per **Zaki Azmi Chief Justice**) Although the appellant contended that until he received the full redemption sum he was not deemed a stakeholder that could not be so. Once a solicitor holds money in trust for his client or any other party for a purpose it remains trust money even if the amount is insufficient to be utilised for that purpose. Therefore the DC and the board had not erred in finding that the charges against the appellant were proven (see paras 41 & 43).

(4) (per **Abdul Aziz Mohamad FCJ** dissenting) This was not a case of stakeholding. Even if the appellant had received in full whatever sum necessary to enable the charge to be redeemed at any time he would not have been a stakeholder for that sum. In a vendor and purchaser cases, a certain sum of money is held by the stakeholder pending the outcome of a future event and the money becomes available to either the purchaser or the vendor according to the outcome of the future event. In the present case, there was no future event to await the outcome of and the money was simply and inevitably to be paid to the government. Therefore it was not a stake. The most that the appellant could do when he received the sum of RM21,223.83 was to keep holding it in the firm's client account until it was augmented to become the full redemption sum and then pay the entire sum to the government to redeem the charge. However, June was the last month for which the Housing Loans Division had certified a redemption sum and there was no evidence of the vendors or the respondent's stand after that as regards redemption. Therefore, the appellant's obligation to treat the RM21,223.38 as meant for the redemption of the charge ceased no later than the end of June 1998 and the appellant was entitled to draw on that sum to settle his bills (see paras 73 & 74).

**[Bahasa Malaysia summary**

Perayu yang mengamalkan undang-undang di bawah nama Tetuan V Selva & Associates ('firma tersebut') adalah peguamcara kepada kedua-dua responden/pembeli dan penjual-penjual dalam jual beli sebuah rumah teres setingkat ('hartanah tersebut') yang didaftarkan di bawah nama penjual-penjual. Penjual-penjual yang merupakan kakitangan kerajaan telah memperoleh hartanah tersebut dengan bantuan pinjaman kerajaan yang mana hartanah tersebut telah dicagarkan kepada kerajaan. Untuk jualan tersebut menjadi efektif cagaran tersebut perlu ditebus supaya hartanah tersebut bebas untuk dipindahmilik kepada responden. Harga jualan hartanah tersebut adalah RM80,000, yang mana responden telah membayar RM40,000 setelah pelaksanaan perjanjian jual beli ('PJB') pada 8 Disember 1997. Baki RM40,000 yang perlu dibayar oleh responden adalah untuk digunakan oleh penjual-penjual untuk mendapatkan penebusan pinjaman perumahan tersebut. Sehingga 30 Mac 1998, penyata akaun menunjukkan jumlah penebusan, yang dikira bulanan, sebanyak RM41,896.52. Oleh itu, dengan menolak jumlah RM40,000 yang perlu dibayar oleh responden, masih terdapat baki sebanyak RM1,896.52 perlu dibayar oleh penjual-penjual. Jun adalah bulan terakhir untuk Bahagian Pinjaman Perumahan meluluskan jumlah penebusan dan tiada jumlah penebusan diberikan untuk bayaran selepas Jun 1987. Pada 7 Januari 1998, responden telah membayar tambahan sebanyak RM21,223.83 tetapi memandangkan

bayaran tersebut tidak mencukupi untuk menebus secara penuh, ia tidak dibayar kepada kerajaan tetapi dibayar kepada dan disimpan dalam akaun pelanggan bagi pihak responden. Dengan pembayaran sebanyak RM21,223.83, responden masih perlu membayar RM18,776.17 untuk menyelesaikan jumlah tertunggak sebanyak RM40,000 dari harga belian. Perayu mendakwa walaupun setelah permintaan berulangkali untuk pembayaran bagi kekurangan tersebut responden gagal untuk membayar. Oleh itu pada 25 Februari 1999 perayu menulis untuk melepaskan dirinya dari bertindak untuk responden dalam hal hartanah ini dan kesemua hal yang mana dia dan firmanya telah bertindak bagi pihak responden. Malah, responden dan penjual-penjual juga telah melepaskan perayu daripada bertindak selanjutnya bagi pihak mereka dan melantik peguamcara baru untuk bertindak bagi pihak mereka di dalam PJB tersebut. Perayu yang mendakwa bahawa responden berhutang dengan mereka yuran tertunggak sejumlah RM34,690 dan pembayaran telah menulis kepada peguamcara baru responden menuntut penyelesaian yuran tertunggak tersebut. Perayu kemudian telah menerima bayaran sejumlah RM3,263 untuk bil-bil berkaitan dua fail, salah satunya perkara PJB tersebut. Perayu memohon untuk menggunakan sejumlah RM21,223.83 di dalam tangan perayu kepada penyelesaian yuran tertunggak dan pembayaran RM26,038 yang perlu dibayar kepadanya oleh responden. Dalam hal ini perayu menulis kepada Majlis Peguam memohon nasihat sama ada dia akan melanggar Akta Profesyen Undang-Undang 1976 ('Akta tersebut') jika dia memohon jumlah RM21,238.83 tersebut, yang masih berada dalam akaun pelanggan, untuk menyelesaikan yuran tertunggak tersebut. Apabila nasihat ini tidak diberikan, perayu melupakan cadangan mendapatkan nasihat daripada Majlis Peguam dan sebaliknya menunggu enam bulan dari tarikh penyampaian bil kos kepada responden sebelum mengambil jumlah RM21,238.83 tersebut dan menggunakannya untuk menyelesaikan kos yang responden berhutang dengannya. Pada 20 Jun 2000, responden menulis aduan kepada sekretariat aduan bahawa perayu telah secara salah menggunakan duit RM21,223.83 tersebut. Satu perbicaraan jawatankuasa tatatertib ('JT') telah diadakan berkenaan aduan ini dan dan jawatankuasa tersebut memutuskan bahawa memandangkan perayu memegang duit RM21,223.83 tersebut yang didepositkan dengan firma tersebut sebagai 'pemegang amanah' ia sepatutnya meneruskan hal yang sama kepada peguamcara responden yang baru dilantik dan bahawa responden tidak mempunyai hak untuk menolak jumlah tersebut yang dipegang oleh firma tersebut bagi pihak responden untuk penyelesaian duit yang responden berhutang dengan firma tersebut. JT oleh itu mendapati perayu bersalah kerana salah laku dan mencadangkan dia digantung daripada amalan undang-undang selama enam bulan. Lembaga tatatertib mengarahkan penggantungan tersebut melalui perintahnya yang bertarikh 27 Jun 2003. Walau bagaimanapun, perintah ini mengandungi kesilapan dan untuk membetulkan kesilapan ini perintah pindaan yang lain dikeluarkan, yang membetulkan kesilapan tersebut tetapi mengandungi

kesilapan lain. Setiap perintah pindaan oleh lembaga kemudiannya didapati mengandungi kesilapan perkeranian bukan sekali tetapi beberapa kali. Perayu merayu kepada Mahkamah Tinggi terhadap keputusan lembaga dan mengemukakan bahawa memandangkan dia telah digugurkan sebagai peguamcara oleh kedua-dua responden dan penjual-penjual PJB tersebut telah dibatalkan dan bahawa dia mempunyai lien ke atas duit tersebut untuk menjelaskan bil-bilnya. Mahkamah Tinggi memutuskan bahawa PJB tersebut tidak terbatal dan bahawa perayu memegang duit tersebut sebagai pemegang amanah. Di dalam rayuan ini terhadap keputusan Mahkamah Tinggi pendirian perayu adalah bahawa dia bukan pemegang saham atau pemegang amanah RM21,223.83 tersebut kerana jumlah tersebut tidak mencukupi untuk menebus cagaran tersebut dan oleh itu pegangan duit tersebut tidak melayakkan sebagai pemegangan saham. Isu-isu di hadapan mahkamah ini adalah sama ada kesilapan-kesilapan yang terdapat di dalam perintah-perintah oleh lembaga dalam apa cara menjejaskan perayu untuk membatalkan perintah lembaga tatatertib dan sama ada dalam keadaan kes ini jumlah RM21,223.83 dalam akaun pelanggan firma tersebut boleh digunakan oleh perayu untuk menyelesaikan yuran tertunggak daripada responden.

**Diputuskan**, menolak rayuan tanpa perintah untuk kos dan menolak perintah penggantungan enam bulan dan menggantikannya dengan penggantungan sebulan:

(1) (oleh **Zaki Azmi Ketua Hakim Negara**) Kesilapan-kesilapan yang dilakukan oleh Lembaga Tatatertib yang terdapat di dokumen-dokumen tersebut adalah jelas kesilapan perkeranian yang boleh diperbetulkan. Oleh yang demikian kesilapan-kesilapan ini tidak boleh menyebabkan perintah-perintah yang dikeluarkan oleh lembaga terbatal dan tidak boleh dikuatkuasakan. Jika kesilapan-kesilapan tersebut dilakukan semasa perbicaraan JT atau Lembaga Tatatertib dan telah menyebabkan prejudis kepada perayu, maka terdapat merit dalam hujah perayu bahawa perintah tersebut adalah batal dan tidak sah. Oleh itu, walau pun lembaga yang menjadi satu badan untuk mendisiplinkan peguam-peguam tidak sepatutnya berulangkali melakukan tindakan cuai sedemikian, kesilapan tersebut yang merupakan kesilapan perkeranian tidak menjejaskan perayu dan tidak boleh membatalkan perintah tersebut (lihat perenggan 21–23 & 25).

(2) (oleh **Zaki Azmi Ketua Hakim Negara**) Perayu dalam kes ini adalah pemegang saham dan oleh itu, selagi PJB itu masih berkuatkuasa dia adalah bertanggungjawab untuk memegang duit tersebut untuk kegunaan penebusan atau untuk kepentingan kedua-dua pihak kepada PJB tersebut dan bukan untuk menggunakannya untuk membayar

bil-bilnya. Hujah perayu bahawa PJB itu telah dibatalkan tidak boleh diambilkira kerana ia tidak akan mempunyai apa-apa tujuan dalam penyerahan fail PJB tersebut kepada peguamcara baru. Tujuan kenapa fail tersebut dipindahkan kepada peguamcara lain adalah untuk meneruskan dengan urusan tersebut. Selanjutnya, memandangkan perayu di dalam kes ini bertindak untuk kedua-dua penjual dan pembeli dia mempunyai tanggungjawab kepada kedua-dua pihak untuk memastikan duit tersebut yang dipegang olehnya digunakan untuk tujuan kenapa dia memegang duit tersebut iaitu untuk menebus hartanah tersebut daripada kerajaan. Memandangkan PJB tersebut masih berkuat kuasa, duit yang dipegang dalam akaun pelanggan adalah masih duit amanah (lihat perenggan 28, 31, 34 & 36).

(3) (oleh **Zaki Azmi Ketua Hakim Negara**) Walaupun perayu menegaskan bahawa sehingga dia menerima jumlah penuh dia tidak dianggap pemegang amanah ia tidak boleh dihujahkan sebegitu. Apabila peguamcara memegang duit tersebut sebagai amanah untuk pelanggannya atau pihak lain untuk sesuatu tujuan ia masih duit amanah walaupun jumlah tersebut tidak mencukupi untuk digunakan bagi tujuan tersebut. Oleh itu JT dan lembaga tersebut tidak salah dalam memutuskan bahawa tuduhan terhadap perayu telah dibuktikan (lihat perenggan 41 & 43).

(4) (oleh **Abdul Aziz Mohamad HMP** menentang) Ini bukan kes pemegangan amanah. Walaupun perayu telah menerima dengan penuh apa sahaja jumlah yang perlu untuk membolehkan caj tersebut ditebus pada bila-bila masa dia tidak akan menjadi pemegang amanah untuk jumlah tersebut. Dalam kes-kes penjual dan pembeli, sejumlah duit dipegang oleh pemegang amanah sementara menunggu keputusan satu kejadian di masa hadapan dan duit tersebut boleh diperoleh oleh sama ada pembeli atau penjual menurut keputusan kejadian di masa hadapan. Dalam kes ini, tidak terdapat kejadian masa hadapan untuk menunggu keputusan dan duit tersebut hanya dan pasti akan dibayar kepada kerajaan. Oleh itu ia bukan satu pertaruhan. Apa yang perayu boleh lakukan apabila dia menerima duit RM21,223.83 itu adalah, memegangnya dalam akaun pelanggan firma tersebut sehinggalah ia diisytiharkan menjadi jumlah penebusan penuh dan kemudiannya membayar jumlah keseluruhan tersebut kepada kerajaan untuk menebus caj tersebut. Walau bagaimanapun, Jun adalah bulan terakhir untuk Bahagian Pinjaman Perumahan mengesahkan satu jumlah penebusan dan tidak terdapat keterangan penjual-penjual atau pendirian responden selepas itu berkenaan dengan penebusan. Oleh itu, kewajipan perayu untuk menggunakan duit RM21,223.38 itu sebagai penebusan caj tersebut terbatal tidak boleh lebih dari akhir bulan Jun 1998 dan perayu berhak untuk mengambil duit tersebut untuk menyelesaikan bil-bilnya (lihat perenggan 73 & 74).]

**Notes**

For cases on suspension from practice, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1982–1984.

**Cases referred to**

*Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426, CA (refd)
*Lee Yoke Chye v Toh Theam Bock & Co* [1987] 1 MLJ 122, SC (refd)
*Maloney v Hardy* (1970) 216 EG 1582 (refd)
*Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116, SC (refd)
*Vije & Co v Co-operative Central Bank Ltd* [1991] 3 MLJ 432, HC (refd)

**Legislation referred to**

Criminal Procedure Code
Legal Profession Act 1976 ss 94(3)(d), 94(3)(n), 94(3)(o), 103C(1)(c), 103D, 103E, 126(1)
Legal Profession (Amendment) Act 2006 s 35
Solicitors' Accounts Rules 1990 rr 2, 7, 7(a), 7(a)(v), 7(b)
Solicitors' Accounts Rules 1967

**Appeal from**: Civil Appeal No 17–17 of 2003 (High Court, Ipoh)

*VS Viswanathan (VS Viswa & Co) for the appellant.*
*Thiru Mangai Krishnan (Jeyaratnam & Co) for the respondent.*
*Balan Nair (Seah Balan Ravi & Co) for the Bar Council.*

**Zaki Azmi Chief Justice:**

**[1]** The appellant is an advocate and solicitor of the High Court of Malaya practising under the name of Messrs V Selva & Associates. There was referred to the disciplinary board under the Legal Profession Act 1976 ('the Act') a complaint against him of using client's money wrongfully. He had acted as solicitor in a sale and purchase agreement entered into between the respondent and a pair of husband-and-wife government servants in respect of a purchase of a single storey terrace house. The money that he was alleged to have wrongfully used was part of the purchase price which the respondent had paid him for payment to the vendors as settlement of part of the purchase price.

**[2]** He was found guilty by the disciplinary board and ordered to be suspended for six months. He failed in his appeal to the High Court. The High Court consisted of three judges empanelled pursuant to s 103E of the Act. He now appeals to this court pursuant to the same section. By virtue of

s 35 of the Legal Profession (Amendment) Act 2006, s 103E and all other provisions prior to the amendment apply to him.

FACTS LEADING TO DISCIPLINARY ACTION

**[3]** The price of the property sold was RM80,000. The purchaser, that is the respondent, paid an advance of RM40,000 on execution of the sale and purchase agreement. The balance of RM40,000, when paid, was to be utilised by the vendors towards redemption of a housing loan from Ministry of Finance Incorporation Malaysia ('MOF Inc'). The loan was taken by the couple from MOF Inc since they were government servants. According to the statement of account from MOF Inc, as on 30 March 1998 the redemption amount would be RM41,896.52. Therefore, less the amount of RM40,000 to be paid by the respondent, there would remain a shortfall of RM1,896.52 which the vendors had to pay.

**[4]** The sale and purchase agreement was entered into on 8 December 1997. On 7 January 1998, about two months later, the respondent paid a further sum of RM21,223.83. This payment was clearly indicated on the receipt issued by the appellant as 'payment of redemption sum for Mr Nadarajah a/l Velu', one of the vendors. On 26 February 1998 the appellant requested the vendors to pay a sum of RM1,896.52 to make up the difference between the redemption sum and the amount of RM40,000 to be paid by the respondent/purchaser. The vendors failed to do so. the respondent had paid RM21,223.83 earlier and had to pay, which he did not, a further sum of RM18,776.17 to settle the property's full price of RM80,000.

**[5]** One year later, on 25 February 1999, the appellant wrote to the respondent to discharge himself from acting for the respondent. At the same time, the respondent was owing to the appellant a sum of money for fees and disbursements relating to other matters in which the appellant had been acting for the respondent.

**[6]** The appellant claimed that the sale and purchase agreement was terminated for failure of the vendors to pay the shortfall in the redemption sum. As will be shown later, this does not seem to be so. The vendors also by letter of 27 September 1999 discharged the appellant from acting for them. All documents were then forwarded to Messrs Thevin Chandran & Wong, the new solicitors appointed by the respondent to act for him in the sale and purchase agreement.

**[7]** The appellant sought to utilise the amount of RM21,223.83 in the hands of the appellant towards settlement of the fees and disbursements due

from the respondent to the appellant. The appellant claimed that the respondent was owing to him a total of RM26,038.00. This means that even setting off the amount of RM21,223.83, which the appellant claimed, the respondent would still be owing him an amount of RM4,814.17.

**[8]** The appellant wrote to the Bar Council seeking advice as to whether he had the right to set off the sum held by him on behalf of the respondent towards settlement of monies due to him from the respondent. The Bar Council however replied that the information provided by him was insufficient. The appellant provided some more information to the Bar Council. The Bar Council remained silent and did not respond to him. So, on 14 April 2000 The appellant decided to utilise RM21,223.83 which was in the client's account to set off the fees and disbursement owed by the respondent to him.

DISCIPLINARY ACTION

**[9]** On 17 April 2000 the respondent lodged a complaint to the Bar Council alleging that the appellant had misappropriated the funds in the client's account and also had not acted in a professional manner. The investigating tribunal dismissed the complaint but the disciplinary committee set up to hear the complaint found the charges against him proven.

**[10]** The disciplinary committee found the appellant guilty of misconduct under s 94(3)(d), (n) and (o) of the Act and concluded, pursuant to s 103C(1)(c) (cited as '103(C)(1)(c)' by the Disciplinary Committee) that there was sufficient merit in the complaint. Its report to the disciplinary board was as follows:

> His failure to pay the money to the newly appointed 'stake-holder' and his unilateral and upper-handed mode of settling his bills raised after he chose to discharge himself from acting for the complainant amounts to professional misconduct. Accordingly, the Disciplinary Committee finds him guilty of misconduct under s 94(3), (d), (n) and (o), and concludes, pursuant to s 103(c)(1)(c) that there is sufficient merit in the complaint.
>
> In view of the foregoing, the Disciplinary Committee recommends that the respondent be suspended from practice for a period of six (6) months.

**[11]** Section 94(3)(d), (n) and (o) reads:

> For the purpose of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes —
>
> (d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;

(n) gross disregard of his client's interests; and

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

**[12]** And s 103C(1)(c) provides for the making of the following recommendation by the disciplinary committee to the disciplinary board:

(c) that there is sufficient merit in the complaint and that the advocate and solicitor should be subject to one of the following disciplinary actions:

(i) imposition of a fine upon the advocate and solicitior for such sum as the Disciplinary Committee deems just;

(ii) suspension of the advocate and solicitor concerned from practice for such period as the Disciplinary Committee deems appropriate in the circumstances; or

(iii) striking off the Roll of the advocate and solicitor concerned.

**[13]** The disciplinary board, pursuant to powers conferred under s 103D of the Legal Profession Act 1976, decided that the appellant be suspended from practice as an advocate and solicitor of the High Court of Malaya for six months from the date of the order 27 June 2003.

**[14]** In respect of the report and recommendation of the disciplinary committee and the order of the disciplinary board, several technical errors were committed.

**[15]** The report and recommendation of the disciplinary committee to the disciplinary board dated 22 January 2003 was not signed by the chairman of the committee. This omission was objected to by the appellant. Another report duly signed by all the members was later sent to the disciplinary board.

**[16]** Subsequently the order issued by the disciplinary board dated 8 July 2003 (more than three years after the complaint by the respondent to the Bar Council) also contained a clerical error. The order stated that the disciplinary board after considering the report of the disciplinary committee made its order on 27 July 2003 (July) when it should have been 27 June 2003 (June). This was subsequently rectified by the disciplinary board by issuing an amended order and explaining that it was a typographical error.

**[17]** Be that as it may, another error appeared in the rectified order. This time the date of the order was not written in. To correct that mistake another

order was issued with the error corrected. Yet another error occurred in this amended order, which by letter dated 29 July 2003 (and received on 31 July 2003) was sent to the appellant. This time the order stated that he was to be suspended for six months effective 21 days from the date of the order, which was 8 July 2003. This meant that the 21 days had lapsed by the time he received it.

**[18]** Needless for me to say, this is a most unhappy state of affairs. The Disciplinary Board being a body for disciplining lawyers should itself not have committed such negligent acts — occurring not once but repeatedly.

**[19]** At the hearing of this appeal, the appellant contended that the first order issued by the board was a nullity because, according to the order, the disciplinary board considered the report of the disciplinary committee on a wrong date. A corrected order again contained other errors

**[20]** The High Court held that the correction done to the order was in fact only a correction of a clerical error. What is important is that the board had properly considered the report and recommendation of the disciplinary committee. Suriyadi J (as he then was) said in his judgment:

> … There was no prejudice suffered by the appellant, with the contents of the order being in accordance with the Disciplinary Committee's report.

**[21]** Shorn of all rhetorics the principal issue before this court is whether the errors committed by the disciplinary board in anyway prejudiced the appellant. The errors were committed after the hearing was completed by the disciplinary committee. At the disciplinary committee hearing there was no complaint by the appellant that he had been prejudiced or that the hearing was unfairly conducted against him. It is clear, when reading the report and recommendation made by the disciplinary committee to the disciplinary board, that the signature of the chairman of the disciplinary committee did not appear on the report. But to me this is pure oversight. The errors appearing on the face of the documents are very obvious and patent. The appellant was not misled in any way by those errors. This oversight could be and was subsequently rectified. This omission could be corrected by getting the chairman of the disciplinary committee to sign it. It is not as if that committee could not make that decision. The report was only a communication from the committee to the board.

**[22]** The errors committed by the disciplinary board also cannot however make the orders issued by it void and unenforceable. The errors committed by the board in this present case are also very obvious. Such errors could therefore be corrected.

**[23]** The other errors appeared in the order by the disciplinary board. Again what the disciplinary board committed were also clerical errors, which were patent on the face of the order. Firstly, the date written in the order as that on which the disciplinary board considered the appellant's case was later than the actual date. This could not be correct. It is so obvious. The second time, the date of the order did not appear on the order. This must again be a clerical omission.

**[24]** If at all, the last order should be made to read as six months effective from 21 days after the receipt of the order. The order, according to the appellant, was received on 31 July 2003. The six months must then be calculated from 21 August 2003. These errors in the circumstances of this case cannot make the order a nullity. Had errors being committed during the hearing at the disciplinary committee or the hearing of the disciplinary board, which errors had caused prejudice to the appellant, then this argument that the order became null and void may perhaps be supported.

**[25]** In my opinion, unless the legislation requires it to be signed by the members, anyone can sign the letter accompanying the report. After all, the order was only declaring the decision of the board. The decision itself was not wrong or even challenged by the appellant — only the way it was conveyed to the appellant. Even the Criminal Procedure Code provides that '... a clerical error may be rectified any time ...' It must therefore be concluded that these errors, being only clerical errors, notwithstanding they are repeatedly committed, but not prejudicial to the appellant, cannot nullify the order.

**[26]** I now come to the second issue. The answer to this second issue depends on whether the amount of RM21,223.83 belongs to the respondent/purchaser or does it belong to him for so long as the sale and purchase agreement remains alive, to use the words of Suriyadi J (as he then was).

**[27]** The question that the court must answer is:

> Whether in the circumstances of this case, the appellant may utilise the sum of RM21,223.83 in the client's account towards settling the amount due to the appellant from the respondent for services rendered by the appellant to the respondent not relating to the sale and purchase agreement?

**[28]** The appellant in this case was a stakeholder. He was therefore duty bound to hold the sum for the purpose of redemption. It was not available to him for as long as the sale and purchase agreement remained alive. He was to hold it for the benefit of both parties to the sale and purchase agreement,

A that is the respondent as well as the vendor couple. He had no authority to utilise the sum for payment of his bills.

**[29]** The appellant submitted that since he was discharged as a solicitor by the respondent and the vendors, the sale and purchase agreement became
B terminated. The appellant also admitted at the inquiry that his fees for this sale and purchase transaction had been paid. The file, including all documents relating to the transaction, was delivered to the new solicitors. The basis of the appellant's argument that he had rights to utilise the deposit by the respondent for settling his bills with the respondent was that he had
C a lien over the respondent's money. He denied any misappropriation and in fact claimed RM4,814.17 still due to him. However, Suriyadi J said (as he then was):

> … So long as the SPA was still alive, the appellant had a duty to hold it for the
D purpose of the required redemption, and not utilise that sum for the payment of his bills.

**[30]** I agree that the sale and purchase agreement had not been terminated. And I do not see any purpose in the handing over of the file to the new
E solicitors if the sale and purchase agreement had been terminated. This is consistent with the finding of the disciplinary committee:

> 1[8] In the absence of any written or oral evidence to the contrary, the DC finds that the agreement between the Vendors and the Purchaser had not been
F terminated at this point in time. This finding is consistent with the fact that both parties had by then retained Messrs Thevin Chandran & Wong to act for them.

**[31]** The reason why the file was transferred to other solicitors was to continue with the deal.
G

**[32]** In *Vije & Co v Co-operative Central Bank Ltd* [1991] 3 MLJ 432, VC George J had this to say in respect of monies paid by the purchasers (who were government servants) to the plaintiff, a law firm, for onward payment to
H the developer (at pp 438–439):

> Accordingly even if the money paid in by the loan division to be paid to the developer became, on the instructions of the developer, money to be paid to the defendant and in spite of the metamorphosis continued to be trust money, the beneficiary of the money now being the defendant, the plaintiffs had the right of
I recourse (in respect of the fees owed by the defendant) by way of, inter alia, set-off against the money *standing to the credit of the defendant*. 'Set-off' here is not to be limited to a set-off pleaded in a statement of defence but has reference to the right of setting off the amount owed against the amount held. In the context such

setting off means the settling of the account between the parties and, in my judgment, can be implemented by drawing on the amount due as was done here. A

(Emphasis added.)

**[33]** The facts in that case were however different. In *Vije & Co*, the monies were paid by the government servants who were purchasers of properties from a developer. In that case, monies were paid to the plaintiff's advocate and solicitor's firm. He was to forward these monies to the developer. The developer owed some money to the defendant bank. It was agreed between the developer and the defendant bank that the sum be paid directly to the bank. B C

**[34]** How do we compare the facts in *Vije & Co* against the facts before us? In the facts before us, the appellant was acting for both the vendors and purchaser. He therefore owed a duty to both parties to ensure that the monies held by him were used for the very purpose for which he was holding them, that is, that they be utilised towards redeeming the property from MOF Inc. As such the following authorities are more relevant to the case before us. These authorities were cited by Hashim Yeop A Sani SCJ (as he then was) in the case of *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116. In that case, what was in dispute was whether the interest that was earned on the deposit placed by the solicitor in the bank pending payment to the vendor belonged to the vendor. Hashim Yeop A Sani SCJ held that (at p 118): D E F

Where money is placed *in medio* in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money. G H

**[35]** Hashim Yeop A Sani SCJ held that the interest on the deposit did not accrue to the parties because there was nothing in the agreement to indicate that it should be paid to either party. And secondly, such entitlement to the interest was also not consistent with the Solicitors' Accounts Rules 1967. He discussed the meaning of 'stakeholding'. This is relevant to the present case. He said: I

What is in essence stakeholding? The word 'stake' is in common parlance used to *apply to any money to be disposed of in accordance with what may happen in future*: and *whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held*.

In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell v Finch* who repeated what was said in *Maloney v Hardy*:

> The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...

In any particular case of sale and purchase, *whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned judge concluded that in this case the appellant received the deposit as agent for the respondents in a fiduciary capacity and therefore on general principles he would be accountable.*

In *Burt v Claude Cousins & Co Ltd* Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrel v Finch*. He said:

> If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', *he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event*: see *Skinner v Trustee of Property of Reed (a bankrupt)* [1967] 2 All ER 1286 at p 1289, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington v Hoggart* (1830) 1 B & Ad 577. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v Kingsman* (1818) 1 B & Ad 683 and *Hampden v Walsh* (1876) 1 QBD 189. He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

Pennycuick VC in *Potters v Loppert* at p 661 considered the law in relation to contract deposits. Where money is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

In the present case no doubt the appellant was retained as solicitor by the respondents during the material period. In the absence of any agreement to the contrary it would be easy to conclude that the appellant would have received the deposits on behalf of the respondents as their agent or trustee. …

(Emphasis added.)

**[36]** So from these it can be concluded that whether the appellant held the money as stakeholder (or trustee) or not depends on the terms of the agreement between him and his clients. We must not forget here that the appellant was acting as stakeholder for both the vendors and purchaser. Both were his clients. It is not as if he was acting only for one party to the transaction. That sum was held by him not just for the benefit of the respondent alone but rather for the vendors as well. He was therefore a trustee for both parties. The money he was holding in the client's account was meant to be paid to MOF Inc to redeem the property in question. He was holding the monies to await the vendors to pay him the difference and thereafter to pay MOF Inc to enable the property to be redeemed or if the agreement was later repudiated, he was to refund the money to the respondent. In this case, he was discharged from acting for the vendors and he was required to transfer the file to the new solicitors. He was also terminated by the vendors as their solicitors. The fact that the file was to be transferred to the new solicitors and his appointment to act for the vendors was terminated, does not make the sale and purchase agreement to come to an end. In fact, I agree with the conclusion arrived at by Suriyadi J that the sale and purchase agreement was still alive. It therefore means that the money that was held in the client's account was still trust money. On the other hand, had the sale and purchase agreement been terminated, it would depend on the terms of the sale and purchase agreement how such sum held in the client's account was to be disposed of. If it was to be refunded to the respondent, and the vendors ceased to be his clients, then perhaps that money may be utilised pursuant to r 7(a) to settle the debt due to him from the respondent.

**[37]** On the contrary, the appellant drew out the sum of RM21,223.83 from his client's account towards settlement of debts due to him from only one of his clients, namely, the respondent.

**[38]** The appellant also relied on r 7 of the Solicitors' Accounts Rules 1990 that monies in client's account could be used for 'payment of the solicitor's costs where a bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs'.

A **[39]** The major distinction between just money in the client's account and the money held in trust is that the money held in trust, as explained in the cases above, does not belong to the client. It is to be held by the solicitors for the benefit of other parties as well.

B **[40]** In my opinion the more relevant provision is r 7(b) relating to trust money. Rule 7(a)(v) only provides that the client's money could be used for certain purposes mentioned therein. Rule 7(b) is for payment in execution of the particular trust, in this case payment to the vendor or for the purpose of redeeming the property from MOF Inc. Rule 7 is also related to use of client's
C money. What could happen in future to the case before us was that the vendors would pay the balance to make up the redemption sum for payment to MOF Inc.

**[41]** The appellant also contends that until he receives the full amount, he
D is not deemed to be a stakeholder. But that cannot be so. Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust.

E **[42]** There are many instances where money is held in client's account on behalf of that client alone. It is in these circumstances that the solicitor is permitted to utilise that money towards payment of money due to him from that client.

F **[43]** I find that the disciplinary committee and the disciplinary board had not erred in finding that the charges against the appellant were proven. I dismiss the appeal.

G **[44]** For the above reasons, the appeal is dismissed but I would make no order as to costs.

**[45]** As regards punishment to be imposed on the appellant, I am sympathetic with him. After all, he did something to seek the advice of the
H Bar Council. The Bar Council ignored him. He did what he thought was his right.

**[46]** As such, I have no alternative but to order a token suspension. I therefore set aside the order of suspension of six months and substitute it
I with a suspension of one month. He had already served his suspension from 28 October 2005, until the Federal Court stayed the order on 21 February 2006. His suspension shall therefore be considered to have been served.

[47] I make no order as to costs. A

[48] My learned brother Hashim Yusoff FCJ, has seen this judgment in draft and expressed his concurrence.

**Abdul Aziz Mohamad FCJ (delivering dissenting judgment):** B

[49] The misconduct which the disciplinary committee found the appellant guilty of and for which the disciplinary board, which affirmed and accepted the recommendations of the disciplinary committee, suspended him C from practice for six months, involved the use by him of a sum of RM21,223.83 paid into a client account in connection with a sale and purchase agreement ('SPA') dated 8 December 1997 between a married couple, who were government servants, as vendors, and the respondent, as purchaser. The sale was of a landed property with a single storey terrace house D erected on it and registered in the names of the vendors. The vendors had acquired the property with the assistance of government loan for which the property was charged to the government as security. For the sale to be effective it was necessary that the charge be redeemed so that the property would be free to be transferred to the respondent. E

[50] The sale price of the property was RM80,000, of which the respondent had paid RM40,000 at the date of the SPA. the respondent had another RM40,000 to pay. As to when he had to pay that balance of the purchase price, this was set out in section III of the second schedule to the F SPA, which stipulated that time was of the essence. The date was not a definite date but depended on certain events which I shall not touch upon because the question has not arisen in this appeal and has therefore not been regarded by any party as relevant. Suffice it to say that, according to cl 3(iii) of the SPA, the completion date was to be the date when the vendors received G the full purchase price and that, by cl 5, the vendors authorised their solicitors to utilise the balance of the purchase price for paying the redemption sum due to the government. Although cl 2(i) designated KC Lai & Co as the vendors' solicitors, this case has proceeded on the basis that it was the appellant, who has been practising in the name of V Selva & Associates, who H was the solicitor acting for the vendors as well as the purchaser in the sale and purchase of the property.

[51] On 29 December 1997, the Housing Loans Division of the Treasury, the appropriate department of the government, in response to the appellant's I request, wrote to the appellant to inform him of the amount of the redemption sum. Each vendor had taken a loan to jointly acquire the property and separate accounts had been kept by the division, so that there were two letters, one setting out the redemption sum as regards the husband,

and another as regards the wife. The redemption sum was computed by the month. Six months were provided for, January to June 1998. The amount increased from month to month, on account of interest. For example, for January 1998, the amount was RM41,622.68 (RM21,223.83 for the husband plus RM20,398.85 for the wife). For March 1998, the amount was RM41,896.52 (RM21,363.47 for the husband plus RM20,533.05 for the wife). And for June 1998, the amount was RM42,307.28 (RM21,572.93 for the husband plus RM20,734.35 for the wife). To redeem the charge the full redemption sum had to be paid, and to redeem the charge by paying the full amount in respect of a particular month, that amount had to be paid before the end of that month. No redemption sum was provided for payment at any time after June 1998.

**[52]** On 7 January 1998 the respondent, who had yet to pay the remaining RM40,000 of the purchase price under the SPA, paid to the appellant a part of it. The sum paid was RM21,223.83, which was the amount of the husband-vendor's part of the redemption sum for the month of January 1998. The appellant, presumably pursuant to cl 5 of the SPA, treated the payment as being towards the redemption sum, which for January was RM41,622.68, and issued to the respondent a receipt stating that the sum paid was 'payment redemption sum for (the husband-vendor)'. But since the sum was not sufficient to redeem the charge, it was not paid to the government but was paid into and kept in a client account in respect of the respondent.

**[53]** With the payment of RM21,223.83, the respondent still had to pay RM18,776.17 to settle the outstanding amount of RM40,000 of the purchase price. The appellant claimed he made many requests for payment of the deficiency, but the respondent failed to pay. Even if the respondent had paid the full RM40,000, that would not have been sufficient to redeem the charge because the redemption sum was more than RM40,000. For March 1998 the redemption sum was RM41,896.52, so that if the charge was to be redeemed in March, a further sum of RM1,896.52 was required, and that would have to be paid by the vendors. So on 26 February 1998 the appellant wrote to the vendors requesting for payment of that amount, but it was not paid.

**[54]** So by the end of June 1998 the charge could not be redeemed because the redemption sum, which for June was RM42,307.28, was not available. There was only the sum of RM21,223.83 in The appellant's client account, which was not sufficient for redemption. And there was no further statement of redemption sum from the Housing Loans Division for any month after June 1998.

**[55]** Matters stood thus until 25 February 1999, a year after the appellant wrote to the vendors requesting for payment on their part of the sum of RM1,896.52. There is no evidence as to what had happened to the SPA before that date or as to the desires or stand of the vendors or the respondent before that date as regards the redemption of the charge. But on 25 February 1999 the appellant wrote to the respondent to say that he no longer wished to act as his solicitor.

**[56]** There is evidence that the respondent retained the services of other solicitors, namely, Messrs Thevin Chandran & Wong ('TCW') but there is no specific evidence of the matter or matters for which they were retained. The respondent was, however, to tell the disciplinary committee that he retained TCW 'to take over'.

**[57]** Besides the SPA, the appellant had acted for the respondent in respect of other matters. On 3 August 1999, more than five months after he ceased to act for the respondent, the appellant wrote to TCW giving particulars of the outstanding fees and disbursements due from the respondent to him, which totalled RM34,690, in respect of 14 matters, 13 of which, including the SPA, bore file references. The appellant said that 'individual bills for all of our files' had been forwarded to the respondent. On 23 September 1999 TCW sent to the appellant payment of RM3,263 for the bills in respect of two files, one of which was the file for the SPA.

**[58]** On 27 September 1999 the vendors discharged the appellant as their solicitor for the SPA and consented to his forwarding all relevant papers to TCW.

**[59]** On 28 September 1999 the appellant sent to TCW all original documents belonging to the two files in respect of which the appellant had been paid RM3,263. Of the files, there remained 11 in in respect of which, according to the appellant, payment was due from the respondent. On 29 September 1999 the appellant wrote to TCW to seek their confirmation whether he could apply the sum of RM21,223.83 that still remained in the client account in respect of the respondent as a set-off against the fees and disbursements owing to the appellant in respect of the 11 files. TCW replied the same day that the respondent did not agree with what The appellant proposed to do. TCW also asked the appellant to let them have a cheque for the sum of RM21,223.83. On 11 October 1999 the appellant wrote to TCW to forward the bills for work done under the 11 files, saying that the total due from the respondent to him was RM26,038 and that he was going to draw the sum of RM21,223.83 from the client account and apply it towards settling the amount of RM26,038, after which there would still be RM4,814.17 due from the respondent to him.

**[60]** On 25 October 1999 the appellant wrote to the Bar Council setting out the facts of the matter and requesting for advice as to whether, in view of r 7(a)(v) of the Solicitors' Accounts Rules 1990, he would be in breach of the Legal Profession Act 1976 if he applied the sum of RM21,223.83, which was still in the client account, towards satisfying the sum of RM26,038 of the 11 bills, and as to whether that rule could be construed as not requiring taxation of the bills.

**[61]** That rule provides that there may be drawn from a client account, in the case of client's money:

> (v) money properly required for or towards payment of the solicitor's costs where a bill of costs or other written intimation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs.

Rule 2 defines 'client's money' as follows:

> 'client's money' means money held [or] received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or in connection with his practice as a solicitor, agent, bailee, stakeholder or in any other capacity and includes solicitor trust money but does not include money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm.

**[62]** It is apparent from the appellant's letter to the Bar Council dated 25 October 1999 that he regarded his letter dated 11 October 1999 to TCW, mentioned earlier, as satisfying the requirements of r 7(a)(v) that the bills be delivered to the client and that the client be notified of the intention to apply the money towards or in satisfaction of the costs.

**[63]** The Bar Council's Legal Profession Committee, after requesting for certain further specific information about the matter from the appellant, and having been furnished with it, informed the appellant by letter dated 23 December 1999 that 'some information is still lacking', without specifying what it was, and requested to be furnished with the 'full facts', which, as far as the appellant was concerned, had already been furnished. So the appellant abandoned the idea of obtaining the Bar Council's advice.

**[64]** The appellant, however, did not straight away draw the sum of RM21,223.83 and apply it towards satisfaction of the costs due to him from the respondent. He waited until six months had elapsed after the delivery of the bills of costs to TCW on 11 October 1999 before doing so. Then on 14 April 2000 he did so. By s 126(1) of the Legal Profession Act 1976 the

respondent had six months from the date of delivery of the bills of costs within which to obtain an order for their taxation, but the respondent did not seek the order.

**[65]** There is no evidence of whether the respondent succeeded in buying the property. In his letter to the Bar Council dated 25 October 1999, mentioned earlier, the appellant stated his belief that the property had been sold by the vendors in early October 1999 to a different purchaser using the services of 'another solicitor', which it is not clear whether it referred to TCW. The appellant's counsel, however, informed us from the bar that the purchase under the SPA had been completed, but that is not in evidence. the respondent never stated how his position under the SPA was adversely affected by what the appellant had done.

**[66]** On 20 June 2000 the respondent wrote a complaint against the appellant to the complaints secretariat about the sum of RM21,223.83. Essentially the complaint was that the appellant had 'wrongly misappropriated' the sum.

**[67]** After a hearing by it, in which the respondent and the appellant gave evidence, the disciplinary committee made its report to the disciplinary board, in which it concluded as follows:

> … the DC concludes that the money was deposited with the respondent as 'stake-holder'. Since money received as 'stake-holder' falls within the definition of 'client's money', the money deposited by the complainant is not 'Trust Money' as defined under the Solicitors' Accounts Rules 1990. He ought to have paid the money towards redemption of (the husband-vendor's) charge or when the parties changed solicitors (the S & P agreement at this point in time not terminated), he ought to have forwarded the sum to the newly appointed solicitors as 'stakeholder'.
>
> His failure to pay the money to the newly appointed 'stakeholder' and his unilateral and upper-handed mode of settling his bills raised after he chose to discharge himself from acting for the complainant amounts to professional misconduct. Accordingly, the DC finds him guilty of misconduct under s 94(3), (d), (n) and (o), …

The disciplinary committee recommended that the appellant be suspended from practice for six months. On 8 July 2003 the disciplinary board ordered the suspension.

**[68]** As to the disciplinary committee's finding that at the point of time when the respondent and the vendors changed solicitors the SPA had not been terminated, it would appear from finding (8) of its findings of fact that it was an inference drawn from the very fact of the change of solicitors.

**[69]** The High Court dismissed the appellant's appeal, holding as follows:

> So long as the SPA was still alive, the appellant had a duty to hold it for the purpose of the required redemption, and not utilise that sum for the payment of his bills. … He had held the sum of money as a stakeholder for the purpose of redeeming the property and nothing else. Whether the amount of RM21,223.83 was only partial or full was irrelevant. What was relevant was its purpose. It was thus incumbent upon the appellant to hold on to that sum of money, until there was an express notice or instruction from the parties of the SPA to terminate the agreement. … Even if any termination of the SPA had taken place it was still incumbent upon The appellant to return that redemption sum to the respondent's new lawyer.

**[70]** It will be seen that both the disciplinary committee and the High Court found that the appellant held the sum of RM21,223.83 as stakeholder. As to what he should have done with the money, the High Court differed with the disciplinary committee. In the view of the disciplinary committee, before the parties changed solicitors the appellant ought to have paid the sum to the government towards redemption of the husband-vendor's charge, and after the change of solicitors he ought to have forwarded the money to TCW as 'stakeholder', presumably for TCW to redeem the husband-vendor's charge. The High Court, however, did not say that the appellant should have paid the sum to the government to redeem the husband-vendor's charge. It would appear that the High Court accepted the appellant's submission, to which there appears to have been no reply, that there was no such endorsement on the document of title to the property as the husband-vendor's charge, by which I understand that there was only one charge, a joint charge, and not two separate charges, one by the husband and another by the wife. To the High Court, the appellant was to keep holding on to the money until the SPA was terminated, in which event he was to return it to the respondent.

**[71]** In the present appeal the stand of the appellant is that the sum of RM21,223.83 still belonged to the respondent and was not 'a stakeholder fund or a trust account', and the appellant was not a stakeholder or a trustee in respect of that sum, because it was insufficient to redeem the charge. The appellant's case is that, because the sum was insufficient, the holding of it by him did not qualify as stakeholding according to the following meaning of 'stakeholding' as expressed by the Supreme Court in *Lee Yoke Chye v Toh Theam Bock & Co* [1987] 1 MLJ 122, at p 124, following Edmund-Davies LJ in *Maloney v Hardy* (1970) 216 EG 1582:

> The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party

holding that deposit may part with it to neither contracting party without the consent of the other, and if competing demands arise he can interplead... A

**[72]** The respondent's stand in the present appeal is that the appellant held the sum as stakeholder and that the sum was stake money which he was to keep holding until notified otherwise by the parties to the SPA. He relies on the dissenting opinion of Lord Denning MR in *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426, a case where an estate agent misappropriated a deposit paid to him by a prospective purchaser of a property, and the question was whether the owner of the property was liable to the prospective purchaser for the money. Lord Denning MR held that the owner would only be liable if the estate agent received the deposit as his agent, being duly authorised to do so, but if he received it: B C

'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event … Until the event is known, it is his duty to keep it in his own hands: or to put on deposit at the bank: … If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it … He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it. D E

**[73]** In my judgment, this was not a case of stakeholding. Even if the appellant had received in full whatever sum was necessary to enable the charge to be redeemed at any time within the months of January to June 1998, he would not have been a stakeholder of that sum. In a stakeholding in vendor and purchaser cases, the sum in question is a stake held by the stakeholder pending the outcome of a future event, and, according as to what the outcome is, the money then becomes available to either the purchaser or the vendor. Stakeholding is a wager situation. In this case the appellant would not have held the redemption sum pending the outcome of a future event. There was no future event to await the outcome of and the sum would not be awaiting any outcome of any future event to be paid to either the vendors or the respondent. The sum was simply and inevitably to be paid to the government. It was not a stake. F G H

**[74]** That the sum actually received by the appellant was only RM21,223.83 and not sufficient for a redemption sum does not change the situation. It was not a stake. The most that the appellant could be expected to do was to keep holding it in the client account until it was augmented to become the full redemption sum and then pay the entire sum to the government to redeem the charge. He could not have paid the sum actually received to the government to redeem the charge because it was not sufficient for a redemption sum. Until the end of June 1998 there was in the client I

account still the sum of RM21,223.83 only, whereas the redemption sum for June was RM42,307.28. June was the last month for which the Housing Loans Division had certified a redemption sum. There is no evidence as to the wishes or stand of the vendors or the respondent after that as regards redemption. In my judgment, the appellant's obligation to treat the sum of RM21,223.83 as meant for redemption of the charge ceased no later than the end of June 1998. After that he was entitled to draw that sum from the client account under r 7(a)(v), the sum being, in my judgment, always client's money, that is to say the respondent's money, and never stake money.

**[75]** I would therefore allow the appeal and set aside the order of the disciplinary board, without having to consider the other grounds of appeal concerning the failure of the chairman of the disciplinary committee to sign its report to the disciplinary board and the defects in the orders issued by the disciplinary board. As regards costs, the respondent has been a nominal respondent. His complaint was pursued by the disciplinary board. In the High Court and in this court the solicitors on record as solicitors for the respondent were solicitors appointed by the disciplinary board. I would therefore order that the disciplinary board pay the appellant's costs here and in the High Court.

*Appeal dismissed. Six month suspension order set aside and substituted with one month suspension order.*

Reported by K Nesan